

**SSB 5478 - S AMD 153**  
By Senator Liiias

**ADOPTED 03/05/2019**

1 Strike everything after the enacting clause and insert the  
2 following:

3 "NEW SECTION. **Sec. 1.** The legislature finds that workforce  
4 mobility is important to economic growth and development. Further,  
5 the legislature finds that agreements limiting competition or hiring  
6 may be contracts of adhesion that may be unreasonable.

7 NEW SECTION. **Sec. 2.** The definitions in this section apply  
8 throughout this chapter unless the context clearly requires  
9 otherwise.

10 (1) "Earnings" means the compensation reflected on box one of the  
11 employee's United States internal revenue service form W-2 that is  
12 paid to an employee over the prior year, or portion thereof for which  
13 the employee was employed, annualized and calculated as of the  
14 earlier of the date enforcement of the noncompetition covenant is  
15 sought or the date of separation from employment. "Earnings" also  
16 means payments reported on internal revenue service form 1099-MISC  
17 for independent contractors.

18 (2) "Employee" and "employer" have the same meanings as in RCW  
19 49.17.020.

20 (3) "Franchisor" and "franchisee" have the same meanings as in  
21 RCW 19.100.010.

22 (4) "Noncompetition covenant" includes every written or oral  
23 covenant, agreement, or contract by which an employee or independent  
24 contractor is prohibited or restrained from engaging in a lawful  
25 profession, trade, or business of any kind. A "noncompetition  
26 covenant" does not include: (a) A nonsolicitation agreement; (b) a  
27 confidentiality agreement; (c) a covenant prohibiting use or  
28 disclosure of trade secrets or inventions; (d) a covenant entered  
29 into by a person purchasing or selling the goodwill of a business or  
30 otherwise acquiring or disposing of an ownership interest; or (e) a

1 covenant entered into by a franchisee when the franchise sale  
2 complies with RCW 19.100.020(1).

3 (5) "Nonsolicitation agreement" means an agreement between an  
4 employer and employee that prohibits solicitation by an employee,  
5 upon termination of employment: (a) Of any employee of the employer  
6 to leave the employer; or (b) of any customer of the employer to  
7 cease or reduce the extent to which it is doing business with the  
8 employer.

9 (6) "Party seeking enforcement" means the named plaintiff or  
10 claimant in a proceeding to enforce a noncompetition covenant or the  
11 defendant in an action for declaratory relief.

12 NEW SECTION. **Sec. 3.** (1) A noncompetition covenant is void and  
13 unenforceable against an employee:

14 (a) (i) Unless the employer discloses the terms of the covenant in  
15 writing to the prospective employee no later than the time of the  
16 acceptance of the offer of employment and, if the agreement becomes  
17 enforceable only at a later date due to changes in the employee's  
18 compensation, the employer specifically discloses that the agreement  
19 may be enforceable against the employee in the future; or

20 (ii) If the covenant is entered into after the commencement of  
21 employment, unless the employer provides independent consideration  
22 for the covenant;

23 (b) Unless the employee's earnings from the party seeking  
24 enforcement, when annualized, exceed one hundred thousand dollars per  
25 year. This dollar amount must be adjusted annually in accordance with  
26 section 5 of this act;

27 (c) If the employee is terminated as the result of a layoff,  
28 unless enforcement of the noncompetition covenant includes  
29 compensation equivalent to the employee's base salary at the time of  
30 termination for the period of enforcement minus compensation earned  
31 through subsequent employment during the period of enforcement.

32 (2) A court or arbitrator must presume that any noncompetition  
33 covenant with a duration exceeding eighteen months after termination  
34 of employment is unreasonable and unenforceable. A party seeking  
35 enforcement may rebut the presumption by proving by clear and  
36 convincing evidence that a duration longer than eighteen months is  
37 necessary to protect the party's business or goodwill.

1        NEW SECTION.    **Sec. 4.**    (1) A noncompetition covenant is void and  
2 unenforceable against an independent contractor unless the  
3 independent contractor's earnings from the party seeking enforcement  
4 exceed two hundred fifty thousand dollars per year. This dollar  
5 amount must be adjusted annually in accordance with section 5 of this  
6 act.

7        (2) The duration of a noncompetition covenant between a performer  
8 and a performance space, or a third party scheduling the performer  
9 for a performance space, must not exceed three calendar days.

10       NEW SECTION.    **Sec. 5.**    The dollar amounts specified in sections 3  
11 and 4 of this act must be adjusted annually for inflation. Annually  
12 on September 30th the department of labor and industries will adjust  
13 the dollar amounts specified in this section by calculating to the  
14 nearest cent using the consumer price index for urban wage earners  
15 and clerical workers, CPI-W, or a successor index, for the twelve  
16 months prior to each September 1st as calculated by the United States  
17 department of labor. The adjusted dollar amount calculated under this  
18 section takes effect on the following January 1st.

19       NEW SECTION.    **Sec. 6.**    A provision in a noncompetition covenant  
20 signed by an employee or independent contractor who is Washington-  
21 based is void and unenforceable:

22        (1) If the covenant requires the employee or independent  
23 contractor to adjudicate a noncompetition covenant outside of this  
24 state; and

25        (2) To the extent it deprives the employee or independent  
26 contractor of the protections or benefits of this chapter.

27       NEW SECTION.    **Sec. 7.**    (1) No franchisor may restrict, restrain,  
28 or prohibit in any way a franchisee from soliciting or hiring any  
29 employee of a franchisee of the same franchisor.

30        (2) No franchisor may restrict, restrain, or prohibit in any way  
31 a franchisee from soliciting or hiring any employee of the  
32 franchisor.

33       NEW SECTION.    **Sec. 8.**    An employer may not restrict, restrain, or  
34 prohibit an employee earning less than twice the applicable state  
35 minimum hourly wage from having an additional job, supplementing  
36 their income by working for another employer, working as an

1 independent contractor, or being self-employed: Provided, that this  
2 section shall not apply to any such additional services when the  
3 specific services to be offered by the employee raise issues of  
4 safety for the employee, coworkers, or the public, or interfere with  
5 the reasonable and normal scheduling expectations of the employer.  
6 This section does not alter the obligations of an employee to an  
7 employer under existing law, including the common law duty of loyalty  
8 and laws preventing conflicts of interest and any corresponding  
9 policies addressing such obligations.

10 NEW SECTION. **Sec. 9.** (1) Upon a violation of this chapter, the  
11 attorney general, on behalf of a person or persons, may pursue any  
12 and all relief. A person aggrieved by a noncompetition covenant to  
13 which the person is a party may bring a cause of action to pursue any  
14 and all relief provided for in subsections (2) and (3) of this  
15 section.

16 (2) If a court or arbitrator determines that a noncompetition  
17 covenant violates this chapter, the violator must pay the aggrieved  
18 person the greater of his or her actual damages or a statutory  
19 penalty of five thousand dollars, plus reasonable attorneys' fees,  
20 expenses, and costs incurred in the proceeding.

21 (3) If a court or arbitrator reforms, rewrites, modifies, or only  
22 partially enforces any noncompetition covenant, the party seeking  
23 enforcement must pay the aggrieved person the greater of his or her  
24 actual damages or a statutory penalty of five thousand dollars, plus  
25 reasonable attorneys' fees, expenses, and costs incurred in the  
26 proceeding.

27 (4) A cause of action may not be brought regarding a  
28 noncompetition covenant signed prior to the effective date of this  
29 section if the noncompetition covenant is not being enforced.

30 NEW SECTION. **Sec. 10.** (1)(a) Subject to (b) of this subsection,  
31 this chapter displaces conflicting tort, restitutionary, contract,  
32 and other laws of this state pertaining to liability for competition  
33 by employees or independent contractors with their employers or  
34 principals, as appropriate.

35 (b) This chapter does not amend or modify chapter 19.108 RCW.

36 (2) Except as otherwise provided in this chapter, this chapter  
37 does not revoke, modify, or impede the development of the common law.

1        NEW SECTION.    **Sec. 11.**    This chapter applies to all proceedings  
2 commenced on or after the effective date of this section, regardless  
3 of when the cause of action arose. To this extent, this chapter  
4 applies retroactively, but in all other respects it applies  
5 prospectively.

6        NEW SECTION.    **Sec. 12.**    This chapter is an exercise of the  
7 state's police power and shall be construed liberally for the  
8 accomplishment of its purposes.

9        NEW SECTION.    **Sec. 13.**    This act takes effect January 1, 2020.

10       NEW SECTION.    **Sec. 14.**    If any provision of this act or its  
11 application to any person or circumstance is held invalid, the  
12 remainder of the act or the application of the provision to other  
13 persons or circumstances is not affected.

14       NEW SECTION.    **Sec. 15.**    Sections 1 through 13 of this act  
15 constitute a new chapter in Title 49 RCW."

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16       On page 1, line 3 of the title, after "businesses;" strike the  
17 remainder of the title and insert "adding a new chapter to Title 49  
18 RCW; and providing an effective date."

EFFECT: Modifies the definition of earnings to: (1) The compensation reflected on box one of the employee's IRS form W-2 that is paid to an employee over the prior year, or portion thereof for which the employee was employed, annualized and calculated as of the earlier of the date enforcement of the covenant is sought or the date of separation from employment; or (2) payments reported on form 1099-MISC for independent contractors. Modifies exclusions from noncompete covenants to also include purchasing goodwill or acquiring an ownership interest in a business. Changes the amounts for making noncompete covenants void to: (a) \$100,000, annualized, per year for employee's earnings and (b) \$250,000 per year for payments to independent contractors. Both amounts are indexed for inflation annually by the Department of Labor and Industries. Removes the application of the additional work provisions when the additional services raise safety issues for the employee, coworkers, or the public, or interfere with the reasonable and normal scheduling expectations of the employer; and also provides that the provisions

do not alter the employee's legal obligations to an employer, including the common law duty of loyalty and conflicts of interest laws. Limits a private right of action to a person aggrieved by a noncompetition covenant. Allows the attorney general to pursue any and all relief. Provides that a cause of action may not be brought for a covenant signed prior to the effective date if the covenant is not being enforced. Removes the definition of average annual wage.

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